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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ISRAEL MAGANA, Defendant and Appellant.	B280269 Los Angeles County Super. Ct. No. KA104309

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Israel Magana guilty of two first-degree murders and illegal possession of a firearm, and found true gang and firearm enhancements and a multiple murder special circumstance. Magana appeals, and we affirm.

BACKGROUND

An amended information, filed November 22, 2016, charged Magana with the October 23, 2013 murders of Corvan Brady and Charles Cooper and the attempted murder of Kendall Montgomery, possessing a firearm as a felon with two priors on that same date, and the November 2, 2013 murder of Matthew Martin. The information alleged firearm enhancements, gang enhancements, and a multiple murder special circumstance. After trial, a jury found Magana not guilty of the murder of Cooper and the attempted murder of Montgomery. The jury found Magana guilty of the murders of Brady and Martin, and found true the firearm and gang enhancements and the multiple murder special circumstance. The trial court sentenced Magana to life imprisonment without the possibility of parole, plus 35 years to life in state prison.

1. *The Brady murder outside the doughnut shop*

A Pomona police officer testified that at 2:00 a.m. on October 23, 2013, he was driving on Holt Avenue (known for gang activity at night) and saw a body lying in the middle of the road. The officer stopped the car and got out. Two people ran up yelling: " 'He was shot.' " The man on the ground, later identified as Corvan Brady, was shaking spasmodically and his breathing was labored. Brady died of multiple gunshot wounds.

A crime scene investigator found bullets and bullet fragments outside a nearby doughnut shop. Surveillance video from the doughnut shop's cameras showed a man holding and

firing a gun. The man wore a hoodie and light colored basketball shorts with stripes down the side. Police searching Magana's shared bedroom in his mother's apartment on Kingsley Avenue found a pair of shorts like those in the video. The shorts had gunshot residue on them.

Two Pomona police officers identified the man in the doughnut shop video as Magana. Detective Greg Freeman had seen Magana on the street, and driving in the area. Detective Freeman had stopped Magana and spoken to him at least ten times, including two traffic stops in which members of the 12th Street gang were in the car with Magana. Detective Freeman recognized Magana's unique gait (Magana is distinctively bowlegged) and his clothing.

Officer Jaime Martinez had had at least 20 contacts with Magana, and recognized him immediately by his extreme skinniness and bony legs, his basketball shorts, and his high top basketball shoes. He had conducted surveillance on Magana and on his residence on numerous occasions. In 2009, Officer Martinez had filled out a field interview (FI) card for Magana after a traffic stop. Magana "admitted to Ghetto Side Pomona," and the other man in the car was a 12th Street member. Magana had 12th Street paraphernalia with him, and gave his moniker as "Cheetah." Officer Martinez knew (based on many contacts with other gang members) that Magana had associated with Ghetto Side, and from there had been "jumped in" to the Pomona 12th Street gang.

2. *The carport murder of Matthew Martin*

In the early morning of November 2, 2013, Matthew Martin was murdered in the carport of the same Kingsley Avenue apartment complex where Magana lived with his mother. Martin

was found shot to death in the passenger seat of his SUV, with three or four clearly visible gunshot wounds to his face and head. The shots appeared to have been fired from the driver's side door, some from outside and some from inside. DNA consistent with Magana's was on the driver's side interior door handle.

Martin and Magana were friends, and Martin had been "affiliating" with the 12th Street gang. Beginning in October 2013, Martin gave Detective Freeman information about the gang's criminal activity, including information about Magana, exchanging over 50 text messages with the detective.

3. *Gang evidence*

Pomona Police Officer Andrew Bebon had been a homicide gang investigator for 10 years, and investigated the Cooper murder and the Montgomery attempted murder. Officer Bebon was very familiar with Pomona 12th Street, a Hispanic gang with 200 to 250 members. Lower level gang members shot each other to "make their bones" and prove they were willing to "put in work" for the neighborhood and prove their loyalty to the gang, as well as to gain respect. In 2013 there was a spike in "the black wars brown wars," in which members of Hispanic gangs (including 12th Street) and members of African-American gangs shot each other in the streets. The conflict was sparked when African-American gang members shot and killed in broad daylight a Hispanic gang member who was walking with a woman pushing a baby stroller.

Officer Bebon described 12th Street's signs and symbols. 12th Street's primary activities were murder, attempted murder, assault with deadly weapons, robbery, extortion, narcotics dealing, car theft, and vandalism. He had participated in hundreds of investigations of 12th Street's criminal activity.

Officer Bebon identified Magana making a 12th Street hand sign in two photographs with other 12th Street gang members, and in a number of other photographs with 12th Street members. He had "no doubt [Magana]'s a member of 12th Street and goes by the moniker of Cheetah." He based his opinion on Magana's admissions to other officers, courtroom testimony in other cases where 12th Street gang members identified Magana as "Cheetah," and "by who he's been contacted with, the crimes he's committed and been involved in," which showed him to be an active participant in 12th Street.

Presented with a hypothetical crime with facts similar to the evidence about the Brady murder, Officer Bebon believed the crime benefitted 12th Street by creating respect, intimidation, and fear in the community. Hispanic gang members wanted to drive black gang members out of the area, and 12th Street had been warring with the South Side Village Crips for years. Brady was actually a Pasadena Blood, but a shooter who thought he was a South Side Village Crip would be acting to benefit 12th Street because the two gangs were mortal enemies.

A hypothetical crime mirroring the facts in evidence about the Martin murder would be "absolutely done to benefit the gang," because it eliminated a snitch informing to the police. Martin, who was black, was an associate of 12th Street going by "Yellow." 12th Street members did not hate all African-Americans.

The prosecution introduced the prior felony convictions of Larry Gonzalez, Luis Ramirez, and Aldo Ruiz. Officer Bebon testified all three were members of 12th Street, and their convictions were for offenses among the gang's primary activities.

4. *Magana's jailhouse conversations with Brandon Cerda*

Brandon Cerda, who had been in and out of jail, testified that since 2013 he had been a jailhouse informant. After he was back in jail for cargo theft in 2014, the police asked him to talk with other inmates about murders and other serious crimes. An inmate would be placed in Cerda's cell, and when they were comfortable with each other after a day or two, the police would give Cerda a recording device. The detectives would call the inmate out for questioning, and then return him to the cell so that anything "stirred up" would be recorded. The police did not tell Cerda about the inmate's crime beyond the basic charge. Cerda was not expressly promised leniency, although the officers would tell the prosecutor and the judge about Cerda's assistance. He was not paid for talking to inmates while in custody. After his release from jail, Cerda provided information to various law enforcement agencies and received substantial financial compensation. At the time of his testimony, Cerda was on probation.

In January 2014, Magana was placed in Cerda's cell. Deputies had told Cerda the crimes were murders. Magana introduced himself as "Cheetah." Cerda knew of Cheetah from Magana's brother-in-law, "Risky," who had been placed with Cerda earlier. In social conversation, Cerda told Magana he knew Risky, who had been called out for the murder of Yellow (Martin). Magana said Yellow was his friend and "[h]e got killed being a snitch." Magana also mentioned another murder just before Yellow's, when Magana "killed somebody in front of a doughnut store." Magana told Cerda his close friends in 12th Street were Spizo and Junior.

The next day, detectives gave Cerda a recording device, and Magana was called out of the cell. When Magana returned he told Cerda that he was the shooter in the doughnut store murder on Holt. Magana had shot a black man who had shot Magana before in the leg. The man ran off, and Magana ran after him and shot and killed him. Magana believed the victim was from South Side Village and "just gangbanging."

Over the course of various conversations, Magana told Cerda the police took all his clothes on "[t]he day that they raided my pad." Cerda asked: "Remember how you told me they found the shorts?" Magana said the shorts were basketball shorts, and also discussed whether gunpowder could get on his shorts, and how to account for it.

Magana told Cerda he and Spizo were involved in Yellow's murder. They asked Yellow to meet them, and then walked up to Yellow's car in an alley between two garages. Magana knocked on the driver side window and opened the door, and Spizo shot Yellow, who was in the passenger seat. Magana had learned Yellow was an informant after Yellow mistakenly texted Magana with a message meant for the police officer.

Magana told Cerda he committed eight murders in 2013. Magana got into the gang life when he was 16.

The jury heard recordings (some of which were unintelligible) and saw transcripts of the conversations.

5. *Defense evidence*

An expert on eyewitness identification testified that memory is much more imprecise than a camera. The accuracy of an identification (including one made by looking at a surveillance video) depends on multiple factors such as exposure time and

whether the face is visible. An identification based on body type or gait was less reliable.

DISCUSSION

1. *Magana's four statements about eight murders were properly admitted*

As reflected in the transcripts, after Magana said, "They're trying to get me for another one[,]" Cerda asked, "You said you had eight?" Magana replied: "It's probably close to that." Later, Magana complained that every time something happened his name popped up, and Cerda replied: "You say you had eight last year so, they'd probably be after you, you know what I mean? That's a lot of murders, dude." Magana agreed, and Cerda continued: "For one year, you were out there, fucking active like a mother fucker." Magana replied, "I was young and in business." Cerda asked: "Putting in work, huh?"—and Magana answered: "Yes, sir." Later, when Cerda asked whether Magana had "another thirteen," Magana corrected him and said it was eight. In another conversation, Cerda said, "Going strong, huh, eight murders under your belt in one year. I'd say that's strong, no?" Magana answered: "Hell, yeah. [Unintelligible] for life."

Before trial, the court stated: "[T]he comment about eight murders is not coming in. That's character evidence. . . . [Cerda]'s not going to be allowed to opine or to say that [Magana] admitted to eight murders. I think that's incredibly prejudicial. . . . If defense counsel doesn't want that to come in I'm going to exclude it." Defense counsel stated she "definitely" did not want the statements about eight murders in evidence. Later, just before Cerda testified, the prosecutor asked the court to reconsider, arguing the statements were not introduced to show character, but were related to Magana's admission to the

three murders charged in this case: "He's admitting these murders as being part of the eight." The court conducted an Evidence Code section 352 analysis, asking defense counsel, "How is this not extremely probative [of the three charged murders]?" Counsel responded that the evidence in two of the murders was circumstantial, and the prosecutor was trying to "back door character."

The court concluded that, heard in the context of the conversations and considered together, the statements were background information and probative of the gang motive ("putting in work"), and that considerable probative value outweighed the considerable prejudice. The court found all the statements admissible, and deemed the defense's objection a continuing objection. The prosecutor did not refer to the comments in closing argument.

Magana argues on appeal that the statements had no probative value, tended only to show that Magana had a propensity to commit violent acts, and rendered his trial fundamentally unfair. We conclude the trial court did not " 'exercise[ ] its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice' " when it admitted the statements. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328-1329 (*Foster*).)

Evidence that the defendant committed other crimes is not admissible to show bad character or a criminal disposition, but is admissible to prove "the intent with which the perpetrator acted in the commission of the charged crimes." (*Foster*, *supra*, 50 Cal.4th at p. 1328.) To be admissible to prove intent, the other crimes must be sufficiently similar to support the inference that the defendant probably had the same intent in committing the

crimes charged. (*Ibid*.) The trial court must also consider whether the evidence's probative value is substantially outweighed by the probability that its admission would "create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Ibid.;* Evid. Code, § 352.)

Magana told Cerda he had committed eight murders in 2013, without further detail except that he was "putting in work." The gang expert testified that lower level gang members shot each other to prove they were willing to "put in work" for the neighborhood and prove their loyalty to the gang, as well as to gain respect, and that Hispanic gangs wanted to drive black gangs out of the neighborhood. Magana's statements were probative of a gang motive for the charged murders, and an intent to benefit the gang. Magana was "putting in work" as a 12th Street member when he shot and killed Brady at the doughnut shop, to retaliate for Brady shooting him in the leg and because he believed Brady was a member of a black gang. Magana also was "putting in work" when he shot and killed Martin, who was a snitch for Detective Freeman. Magana's references to eight murders tended to prove his gang membership, supported the prosecution's argument that the charged murders and attempted murder were committed for the benefit of the gang, and helped explain why, in this case, Magana would engage in multiple shootings so close together.

We agree with Magana that the evidence presented a real danger the jury would conclude that he had a violent character and therefore was guilty of the charged crimes. Despite that undeniable potential for prejudicial effect, however, we do not believe the trial court abused its discretion when it decided the probative value of the evidence of gang motive was not

substantially outweighed by *undue* prejudice. During the conversations with Cerda, Magana gave highly incriminating details regarding both of the murders of which he was convicted. His admission—or boast—that he committed other gang-related murders in 2013 was unaccompanied by any detail, and so was "less inflammatory than the evidence in the present case" (*Foster*, *supra*, 50 Cal.4th at p. 1332), including his own description of the murders of Brady and Martin. Magana's propensity for violence was in evidence without the challenged statements.

Magana argues that the admission of the statements was a miscarriage of justice, which occurs when an examination of all the evidence shows that it is reasonably probable that without the statements in evidence, the result of the trial would have been more favorable. (*Foster*, *supra*, 50 Cal.4th at p. 1333.) We disagree. First, the jury acquitted Magana of one of the murders and the attempted murder charged against him, which shows that the jury was clearly able to convict on facts in evidence rather than propensity. Second, there was strong evidence that Magana committed the Brady murder (the doughnut shop video, the shorts with gunshot residue, and his description of the crime to Cerda) and the Martin murder (the 12th Street connection and Martin's "snitching," the DNA on the SUV's door, and his description of the details to Cerda). The counts of conviction were amply supported even without Magana's statements about other murders. Third, other evidence of his gang membership (the Pomona police officers' testimony, and the Cerda conversations) supported the true finding on the gang enhancement. It was not reasonably probable that Magana would have obtained a more favorable result if the court had

redacted the four statements about eight murders from the recordings and transcripts.

2. *Magana forfeited his confrontation clause claim, and, in any event, any error was harmless*

Magana argues that under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), his Sixth Amendment right to confrontation was violated when the court allowed Officer Bebon to offer expert opinion testimony based on testimonial hearsay to prove that Magana was a 12th Street member with a gang motive to commit the murders, and to prove the predicate offenses necessary to establish that 12th Street was a criminal street gang.

A true finding on a gang enhancement allegation under Penal Code section 186.22, subdivision (b) requires the prosecution to prove the defendant committed the charged crimes for the benefit of, at the direction of, or in association with a criminal street gang. The prosecution must also prove that members of the purported gang engage in a "pattern of criminal gang activity," meaning two or more enumerated predicate offenses committed on separate occasions or by two or more gang members. (Pen. Code, § 186.22, subd. (e).)

First, he points to Officer Bebon's testimony that Magana was a 12th Street member: "I have no doubt he's a member of 12th Street and goes by the moniker of Cheetah. . . . I base that on his self admission to other patrol officers. I base that on courtroom testimony in other cases where other members of 12th Street have said he's a 12th Street gang member by the name of Cheetah. [¶] I go by who he's been contacted with, the crimes he's committed and been involved in. They all show not only is he a

12th Street gang member, but he's an active participant in 12th Street." Magana did not object.

Magana argues this was testimonial hearsay under *Sanchez*, in which the California Supreme Court held: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. . . . If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.)

A prosecution gang expert had opined Sanchez was a member of a gang based on police contacts when Sanchez was with other members of the gang, and on statements he made to other officers when given a notice of his gang association; the expert admitted he had never met Sanchez and was not present during any contacts. Instead, the expert depended on police reports and an FI card. (*Sanchez*, *supra*, 63 Cal.4th at at pp. 671-673.) The court concluded that the case-specific statements in the police reports and FI card were hearsay offered by the expert to the jury as true, and thus violated the Evidence Code. (*Id.* at pp. 684-685.) Further, if the hearsay was testimonial and no exception applied under *Crawford v. Washington* (2004) 541 U.S. 36, the defendant should have had the opportunity to cross-examine the declarant, or the evidence should have been excluded. (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) The evidence was testimonial because it was gathered during an investigation

of a completed crime, rather than during an emergency or for some other purpose. (*Id.* at p. 694.)

Sanchez was decided more than four months before Magana's trial in November 2016. Nevertheless, Magana's counsel did not object to any of the testimony Magana identifies as hearsay, or as violative of the Confrontation Clause. Generally, the defendant's failure to object forfeits a hearsay objection and a claim of violation of the Confrontation Clause (*People v. Redd* (2010) 48 Cal.4th 691, 730), including under *Sanchez*. (*People v. Powell* (2018) 6 Cal.5th 136, 179-180.) This failure to object resulted in an underdeveloped record. If Magana had lodged a hearsay objection, the prosecution "would have had the burden to show the challenged testimony did not relate testimonial hearsay." (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 584-585.) But the prosecution was not called to account. We cannot tell from Officer Bebon's statements (regarding Magana's admission to other officers and who Magana was with when contacted) whether those admissions were made in informal settings, were made during the investigation of a specific crime, or came from police reports or FI cards and were thus testimonial. (*Ibid.*) "[T]he record is too sparse" for us to definitively conclude the nature of the contacts with Magana. (*People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1251.) "[D]ue to defendant's failure to object, the record is not clear enough for this court to conclude which portions of the expert's testimony involved testimonial hearsay. Accordingly, defendant has not demonstrated a violation of the confrontation clause." (*Ochoa*, at p. 586.) Magana has forfeited the specific confrontation clause objections he makes on appeal. (*People v. Blessett* (2018) 22 Cal.App.5th 903, 941.)

In any event, if the evidence was hearsay in violation of state law, relief is only available if Magana would have obtained a more favorable result if the testimony had not been admitted. If the hearsay was testimonial, Magana is not entitled to relief if the violation of the confrontation clause was harmless beyond a reasonable doubt. (*Sanchez*, *supra*, 63 Cal.4th at pp. 698-699.) Magana admitted his membership in 12th Street in his recorded conversation with Cerda, and said his 2013 murders were "putting in work." Officer Martinez testified that he knew Magana was a 12th Street member based on photographs, and on an encounter with Magana wearing gang paraphernalia and in the company of a known 12th Street member. Magana's self-admission was before the jury; Officer Martinez based his testimony on his own observations of photos and of Magana himself. Given this competent evidence, the admission of hearsay evidence of Magana's membership in 12th Street was harmless under either standard.

Second, Magana objects to Officer Bebon's testimony that the three men whose convictions satisfied the predicate offense requirement under Penal Code section 186.22 were 12th Street members. Officer Bebon testified that he had known Larry Gonzalez since he was 13, was the investigative detective on Gonzalez's 2008 murder case, and "absolutely" knew Gonzalez was a 12th Street member from his admissions to Officer Bebon over the years. Officer Bebon had contacted Luis Ramirez and knew he was a 12th Street member by his past admissions when Ramirez was out on the street. Officer Bebon knew Aldo Ruiz, "Roach from Pomona 12th Street," from participating in an investigation of Ruiz for robbery, and from county jail roll calls in

which Ruiz gave his moniker and his neighborhood. Again, Magana did not object.

This claim is also forfeited by Magana's failure to object. Even if Magana had objected, it is not clear that the objection would have been sustained. Under *Sanchez*, *supra*, 63 Cal.4th at p. 676, case-specific facts are "those relating to the particular events and participants alleged to have been involved in the case being tried." *Sanchez* therefore held an expert's background testimony may rely on hearsay to describe general gang behavior or the gang's "conduct." (*Id.* at p. 698.) Whether this includes the general background testimony the gang expert gives about the gang's operations, *primary activities*, and *its pattern of criminal activity* has divided the courts of appeal. (Compare *People v. Blesset*, *supra*, 22 Cal.App.5th at p. 944; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411; and *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175; with *People v. Lara* (2017) 9 Cal.App.5th 296, 337 and *People v. Ochoa*, *supra*, 7 Cal.App.5th at pp. 582-583.)

Even if the testimony about the predicate offenses ran afoul of *Sanchez*, the error would have been harmless. As Magana concedes, "the jury, even if it disregarded the prior crimes committed by Larry Gonzalez, Luis Ramirez, and Aldo Ruiz, could have considered the two murders allegedly committed by appellant as predicate offenses." (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457-1458.)

Finally, Magana argues that his counsel's failure to object on hearsay grounds under *Sanchez* constituted ineffective assistance of counsel. We presume that counsel's performance was within the wide range of professional competence, and that the lack of an objection was a strategic choice, intended to avoid

additional testimony about Magana's gang affiliation beyond what was otherwise before the jury (including his own self-admission to Cerda). (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) We reject the claim of ineffective assistance.

3. *The jury instructions were proper*

Magana contends the jury should have been instructed to consider whether Cerda was promised immunity or leniency in exchange for testifying. Cerda testified under a grant of use immunity, meaning that his testimony at Magana's trial could not be used against him in another proceeding, so long as he testified truthfully.

The trial court gave the jury CALCRIM No. 226, which informs the jury of its duty to decide whether a witness is credible, and instructs them to use their common sense, experience, and "anything that reasonably tends to prove or disprove the truth or accuracy of [the witness's] testimony." The court did not include optional language telling the jury that in judging the credibility of the witnesses it may consider: "[W]as the witness promised immunity or leniency in exchange for his or her testimony?" Magana did not object to the instruction as given, and did not propose the addition of this optional language. He argues that the trial court had a sua sponte duty to include the extra language.

"If defendant believed the instructions were incomplete or needed elaboration, it was his obligation to request additional or clarifying instructions." (*People v. Dennis* (1998) 17 Cal.4th 468, 514.) Magana has forfeited this claim of error. Although he also argues that the trial court had a sua sponte duty to instruct the jury on this ground, we disagree. "[T]here is no such duty to give such instructions sua sponte" when an accessory testifies under a

grant of immunity. (*People v. Freeman* (1994) 8 Cal.4th 450, 508.) The court does not have a sua sponte duty to give clarifying, or pinpoint instructions where the instruction given was otherwise correct. (*People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Hunter* (1989) 49 Cal.3d 957, 977.) Even if Magana's counsel had requested the additional language, it would have been proper for the trial court to deny the request. (*People v. Vines* (2011) 51 Cal.4th 830, 883-884.)

In addition, the trial court did instruct the jury with CALCRIM No. 336: "View the testimony of an in-custody informant against the defendant with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case." The instruction also told the jury to use the informant's testimony only if the testimony was supported by other credible and independent evidence. Here, independent evidence supported Cerda's testimony.

4. *The trial court did not abuse its discretion when it denied Magana's request to reopen*

At the start of a morning session during defense counsel's closing argument, she advised the court at sidebar that the night before she had received an email from counsel for Magana's former codefendant, including a case summary and a copy of the sealed transcript of a 2014 sentencing hearing from an earlier case in which Cerda was the defendant (BA416119). The sealed transcript had been released during an in camera hearing in the trial of Magana's former codefendant (for the Martin and Cooper

murders, and the Montgomery attempted murder) after the cases had been severed. Defense counsel represented that the transcript showed that a condition of Cerda's probation required him to testify, contrary to Cerda's testimony that he was not on probation and was testifying to be a good citizen. The prosecutor pointed out that Cerda did state he was on probation, and the plea transcript (which defense counsel had) did not include a probation condition that Cerda was obliged to come back and testify. The court read the plea transcript and the probation conditions, and agreed with the prosecutor: "There is no condition of probation that he show up to court to testify. Zero." Nothing in the transcript was not already in the record, which showed the prosecutor had requested such a specific condition and the trial court in the prior case had denied the request.

Defense counsel requested a dismissal, which the court denied. Counsel then requested that the trial court reopen the case for her to resume cross-examination of Cerda. The court declined the request. Cerda was not required to testify; he had an informal agreement with law enforcement. "This doesn't add anything. It just really doesn't." The record in Magana's case actually contained more detail than the material defense counsel had received the night before, and "nothing here . . . indicates there's been discovery that hasn't been turned over to you." The court sealed the court's copy of the transcript and brought out the jury.

A motion to reopen is addressed to the trial court's sound discretion. (*People v. Homick* (2012) 55 Cal.4th 816, 881.) One factor we consider to determine whether the trial court abused its discretion is " ' "the significance of the evidence." ' " (*Ibid*.) "If the trial court was correct regarding the insignificance of the

evidence, it could not have abused its discretion by denying defendant's motion to reopen and present it." (*Ibid.*)

Magana argues the evidence was significant because it would have impeached Cerda's credibility. The trial court considered the evidence in the sealed transcript. We have also reviewed the sealed transcript, and agree with the trial court that its contents were not significant enough to require reopening for additional cross-examination of Cerda. The trial court did not abuse its discretion in refusing Magana's request to reopen.

Magana also argues that the denial of his request to reopen violated his constitutional right to present a defense. He has forfeited that federal constitutional claim on appeal by failing to raise it during the trial court's consideration of the request to reopen. (*People v. Fuiava* (2012) 53 Cal.4th 622, 670.)

Finally, although Magana "believes that his attorney did act with diligence in presenting the evidence," he also argues that if we believe she did not act diligently (because she could have obtained the transcript earlier), we should find that defense counsel was ineffective. We agree with Magana that counsel was not dilatory in obtaining the transcript. She stated Magana was not part of the other case at the time the sealed transcript was produced, she had requested from the beginning all evidence under *Brady v. State of Maryland* (1963) 373 U.S. 83, and she had received the transcript the night before. Counsel immediately brought the sealed material to the court's attention and argued vigorously for reopening. Nothing indicates she was not diligent in obtaining the evidence and presenting it to the court.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.